EXHIBIT 139

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JRK PROPERTY HOLDINGS, INC.,

Plaintiff,

v.

COLONY INSURANCE COMPANY, et al.

Defendants.

Case No. 21STCV19983

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

[Declaration of Amy M. Churan filed concurrently herewith]

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I. INTRODUCTION

The California Court of Appeal has rejected the theories of recovery on which JRK Property Holdings, Inc. ("JRK") bases its claims for insurance coverage. JRK attributes its financial losses to the government suspension orders issued to slow the transmission of COVID-19. But the Court of Appeal rejected that theory of recovery for pandemic-related financial losses in *Inns by the Sea v. California Mutual Insurance Co.*, 71 Cal. App. 5th 688 (2021) (*Inns*), *review denied* (Cal. Mar. 9, 2022). The *Inns* court held that government-ordered suspensions of business operations do not cause or constitute "direct physical loss or damage" to property under California law.[1]

It is perhaps not surprising, then, that in its Opposition to Insurers' motion for judgment on the pleadings, JRK reframes its theory of loss by pointing almost exclusively to generalized allegations of the presence of the COVID-19 virus. But JRK's reframing is unavailing because *Inns* again forecloses JRK's recovery. Like the *Inns* plaintiff, JRK fails to allege any *facts* showing that the virus caused direct physical loss or damage to any of its hotel or residential properties, or that its financial losses were caused by any such loss or damage. JRK is left arguing that "[t]he *Inns* analysis and its ultimate conclusion are deeply flawed . . ." Opp. at 12 n.10. To the contrary, *Inns* tracks longstanding California precedent. It is also controlling authority of which the California Supreme Court has now denied review, and is on all fours with this case. *Inns* also tracks the decisions of the vast majority of state and federal courts across the country that have dismissed such claims, rejecting the very arguments JRK makes in its Opposition. State and federal appellate courts have unanimously affirmed dismissal.

[1] As explained in the opening brief, all but one of the coverage provisions JRK invokes require it to show "direct physical loss or damage" to property to satisfy coverage. The single coverage provision (present in some policies) that does not require direct physical loss or damage is a sub-limited Interruption by Communicable Disease provision. But this coverage applies only where access to the properties is "limited, restricted, or prohibited" "as a result of" "[a]n order of an authorized governmental agency regulating the actual not suspected presence of communicable disease," or a "decision of an Officer of [JRK's]" arising from "the actual presence" of COVID-19 at JRK's properties. Jt. Stip., Ex. 1, at GENERALSTAR00000062. JRK has admitted in two federal complaints that "[t]he limited or prohibited access to JRK properties was a result of the global pandemic and government responses to it, ***not*** *due to an order by a governmental agency or JRK officer arising from the actual not suspected presence of the virus*." Churan Decl., Mar. 23 2022, Ex. 1 ¶ 81 (emphasis added); Churan Decl., Jan. 21, 2022, Ex. 1 ¶ 81 (emphasis added).

Finally, JRK asks the Court for leave to amend its Complaint to cure any pleading deficiencies the Court may identify, but it offers no hint of what such an amendment might look like or what additional facts it might allege, even though it has the burden to prove that an amendment would cure its pleading deficiencies. The operative complaint is JRK's third attempt.[2] If there were more facts to allege that could bring its claims within the terms of the Policy, JRK would have alleged them by now. A fourth complaint is not warranted.

As a last resort, JRK requests in the alternative that the Court hold in abeyance a ruling granting Insurers' motion pending the appellate disposition of *Inns*. The California Supreme Court denied the petition for review in *Inns* on March 9, so there is no ground for abeyance.

II. ARGUMENT

A. *Inns* forecloses JRK's recovery for financial losses it alleges were caused by government orders.

In its Complaint, JRK traces its alleged pandemic-related financial losses to government orders issued to slow the transmission of the COVID-19 virus. It alleges that "[t]he Orders . . . have devastated JRK's business. Overnight, hotel properties that were once busy, bustling destinations for travelers became ghost towns, decimating JRK's revenue." Compl. ¶ 6; *see also id.* ¶11 ("Shortly after the pandemic reached the United States and shutdown orders began to be issued, JRK began suffering [financial] losses . . . ."). JRK also alleges:

> States, counties, and cities where JRK properties are located declared states of emergency to limit the spread of the virus. They issued orders suspending or severely curtailing the operations of all non-essential or high-risk businesses and permitting residents to leave their homes only for limited purposes, such as for groceries, medicine, and to perform essential jobs. *The Orders directly impacted JRK's hotels and residential tenants, ultimately leading to the devastating financial losses at issue in this lawsuit*.

Id. ¶ 63 (emphasis added); *id.* ¶ 66 (alleging the government orders "had wide-reaching impacts, including reduced travel and loss of jobs, resulting in tenants failing to pay market rents"). And JRK points to the economic impact of the pandemic and the government orders on the financial

[2] JRK filed a complaint and an amended complaint in the Eastern District of Virginia in civil action No. 1:21-cv-00071 (ECF Nos. 1 and 34). *See* Churan Decl., Mar. 23 2022, Ex. 1; Churan Decl., Jan. 21, 2022, Ex. 1. JRK dismissed its federal action the same day Insurers filed their reply in support of their motion to dismiss, and filed its complaint here later that day.

stability of a primary source of its income—renters of its residential apartments: "[D]ue to the pandemic and shutdown Orders, many of the residential tenants to whom JRK had leased apartments have been unable to continue paying rent, have sought and obtained decreased rental rates, or have terminated their leases." *Id.* ¶ 76. JRK also describes the negative economic impact governmental restrictions on evictions and rental increases have had on its bottom line: "Other governmental restrictions, specifically affecting companies in the business or [sic] owning and managing properties, have prohibited residential evictions, allowed tenants to defer rent payments, prohibited the charging of late fees or interest on unpaid rent, and prohibited otherwise normal rent increases during the pandemic." *Id.* ¶ 77.

In *Inns*, the Court of Appeal rejected the insured's argument that its pandemic-related financial losses caused by government orders could be covered under commercial property insurance policies that require direct physical loss or damage to property to satisfy coverage. 71 Cal. App. 5th at 703-4 (holding that loss allegedly resulting from government orders based on an "invisible virus" throughout the community does not satisfy coverage); *see also Baker v. Oregon Mutual Ins. Co.*, No. 21-15716, 2022 WL 807592, at *1 (9th Cir. Mar. 16, 2022) (citing *Inns* and holding that "the commercial property insurance policy language at issue does not cover loss of business income caused by COVID-related closure orders."). The *Inns* court also explained:

> According to Inns, regardless of the physical presence of the COVID-19 virus, it has adequately pled direct physical loss by alleging "the loss of use, function, and value of its property." Thus, as Inns argues, even if we conclude that the presence of the COVID-19 virus on the premises did not constitute *physical damage* to property within the meaning of the Policy, "a policyholder can reasonably expect that a claim constitutes *physical loss* where the insured property cannot function as intended." As we will explain, this argument fails because it collapses coverage for "direct physical loss" into "loss of use" coverage. *Case law and the language of the Policy as a whole establish that the inability to use physical property to generate business income, standing on its own, does not amount to a "'suspension'. . .caused by direct physical loss of" property* within the ordinary and popular meaning of that phrase.

71 Cal. App. 5th at 705 (last emphasis added).

The court noted that its conclusion that government orders do not cause "direct physical loss of" property was further supported by the "period of restoration" provision in the *Inns* policy, which "is defined as ending on the earlier of '(1) The date when the property at the described premises

should be repaired, rebuilt or replaced with reasonable speed and similar quality; or [¶] (2) The date when business is resumed at a new permanent location.'" *Id.* at 707. It went on to explain:

> The Policy's focus on repairing, rebuilding or replacing property (or moving entirely to a new location) is significant because it implies that the "loss" or "damage" that gives rise to Business Income coverage has a *physical* nature that can be *physically* fixed, or if incapable of being *physically* fixed because it is so heavily destroyed, requires a complete move to a new location. Put simply, "[t]hat the policy provides coverage until property 'should be repaired, rebuilt or replaced' or until business resumes elsewhere assumes physical alteration of the property, *not mere loss of use.*"

Id. (quoting *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021)).

Like the period of restoration in *Inns*, the Policies' Period of Recovery supports the conclusion that the loss or damage to property must be *physical* in nature for coverage to attach. As explained in the opening brief, the Policies issued to JRK provide that "[t]he length of time for which loss may be claimed" "[s]hall not exceed such length of time as would be required with the exercise of due diligence and dispatch to *rebuild, repair, or replace* such part of the property as has been destroyed or damaged." Jt. Stip., Ex. 1, at GENERALSTAR00000061 (emphasis added). JRK argues that the Policies' Period of Recovery "merely sets forth the period of time during which business interruption losses are measured; it does not narrow the scope of the Policies' insuring agreement," Opp. at 18, but the *Inns* court rejected this very argument as "miss[ing] the point":

> We do not focus on the "period of restoration" as an explicit definition of the scope of coverage. Instead, we cite the language because our task is to interpret the Policy using *the whole* of its language . . . The definition of "period of restoration" provides an indication that the phrase "direct physical loss of" property was not intended to include the mere loss of use of physical property to generate income, without any other physical impact to property that could be repaired, rebuilt or replaced.

71 Cal. App. 5th at 707–08; *accord Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 403 (6th Cir. 2021) ("Baked into this timing provision is the understanding that any covered 'direct physical loss of or damage to' property could be remedied by repairing, rebuilding, or replacing the property or relocating the business."); *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) ("To interpret the Policy to provide coverage absent physical damage would render the 'period of restoration' clause superfluous.").

The *Inns* holding that financial losses resulting from government-ordered suspensions of business operations are not covered under policies that require direct physical loss or damage to

property applies squarely to JRK's allegations that the government orders caused its financial losses. *See, e.g.*, Compl. ¶ 63 ("The Orders directly impacted JRK's hotels and residential tenants, ultimately leading to the devastating financial losses at issue in this lawsuit."). JRK's allegations are thus insufficient to state a claim for coverage under the Policies as a matter of California law.

B. *Inns* also forecloses JRK's recovery for financial losses it contends were caused by the presence of the COVID-19 virus at its properties.

Perhaps recognizing that *Inns* forecloses recovery for financial losses attributed to the government orders, JRK belatedly strains to reframe its theory of loss to focus on the presence of the COVID-19 virus. In the opening paragraph of its Opposition, JRK contends that, since March 2020, its "business has been devastated by the novel coronavirus and resulting disease COVID-19's invasion into JRK's residential properties and hotels throughout the United States, physically attaching to surfaces and altering the ambient air within these properties, transforming once high-occupancy tourist and lifestyle destinations into unusable and inherently dangerous proverbial ghost towns." Opp. at 1. But in its Complaint, JRK repeatedly alleged that it was the government orders—not the COVID-19 virus—that turned its properties into "ghost towns." Compl. ¶ 6; *see also id*. ¶¶ 76-77.[3] JRK cannot rewrite its Complaint through arguments in its opposition brief.

JRK's attempted reframing of its theory of loss fails to save its Complaint. JRK does not allege any *facts* showing that its properties suffered any physical loss or damage due to the presence of the COVID-19 virus, or that its financial losses were caused by any such loss or damage. Even assuming JRK alleged the "presence" of COVID-19—as the *Inns* court assumed for purposes of its decision—JRK's claim for economic losses (just like the plaintiff's claim in *Inns*) stems from governmental orders issued to stop the spread of COVID-19, which affected its business activities, and *not* from direct physical loss or damage occasioned by the presence of the virus. *See Inns*, 71 Cal. App. 5th at 699-705.

[3] JRK's Opposition also abandons any mention of the government restrictions that "prohibited residential evictions, allowed tenants to defer rent payments, prohibited the charging of late fees or interest on unpaid rent, and prohibited otherwise normal rent increases during the pandemic," or of the alleged financial losses caused by the pandemic's economic impact on "many of the residential tenants to whom JRK had leased apartments" who became "unable to continue paying rent, have sought and obtained decreased rental rates, or have terminated their leases." Compl. ¶¶ 77, 76.

Also, like the insured in *Inns,* in an effort to avoid dismissal, JRK focuses on allegations that the virus must have been present at many of its hotel and apartment properties because of the presence of tenants and employees who tested positive, and that it is "statistically certain" to have been present at all of JRK's properties given the "countless" people entering and inhabiting its properties. *Id.* ¶¶ 52, 73. JRK alleges that the virus remains in the air for hours or days, attaches to property for days, and cannot be removed through routine cleaning. *Id.* ¶¶ 53, 55-56, 58. And JRK contends that "coronavirus particles" "physically alter[] and transform[] [surfaces] into disease-transmitting fomites." *Id.* ¶ 60. JRK also contends that the coronavirus "compromises the physical integrity of the structures it permeates and poses an *imminent risk of physical damage to all other structures*," and that the presence of the virus has rendered JRK's properties "*unusable for their intended purpose*." *Id.* ¶¶ 55, 70 (emphasis added).

But JRK does not (and cannot) provide any factual support for its conclusory contentions that the presence of the virus "compromises the physical integrity of the structures it permeates" or that it rendered JRK's properties "unusable for their intended purpose." The *Inns* court rejected as conclusory similar allegations—that "the presence of COVID-19 clearly constitutes the requisite 'damage,' as that undefined term is reasonably understood, because its physical presence transforms property, specifically indoor air and surfaces, from a safe condition to a dangerous and potentially deadly condition unsafe and unfit for its intended purpose." 71 Cal. App. 5th at 699-700. As the court observed, "[a]dditional allegations about the science behind the pandemic would not change that analysis." *Id.* at 714. The same reasoning applies to JRK's allegations here.

JRK also does not allege it has had to repair any damage to the "physical integrity" of any of its properties. While JRK alleges that it undertook "heightened measures" "far beyond ordinary or routine cleaning or improved ventilation" "in an attempt to repair the properties from their unsafe, hazardous, and potentially deadly condition," Compl. ¶ 61, it does not say what those "heightened measures" were or identify any measures it undertook to repair damage the virus allegedly caused to the "physical integrity" of any of its properties. Nor can it. Enhanced sanitizing or other prophylactic hygiene measures do not qualify as a repair of damage to property. *Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, 527 F. Supp. 3d 1142, 1150 (N.D. Cal. 2021).

Indeed, although JRK contends that "no amount of diligence can actually prevent coronavirus from causing physical loss or damage to surfaces and air within insured properties," *id.*, it acknowledges that the virus only "linger[s] in the air for minutes or hours," and only "survive[s] on surfaces for days," *id.* ¶¶ 42, 55. JRK thus recognizes the reality that the presence of the COVID-19 virus does not require the kind of remediation and restoration measures that may be needed to rid a property of other substances dangerous to human health, such as asbestos or mold. The Court of Appeal agrees. *See Inns*, 71 Cal. App. 5th at 704 (noting with approval another court's observation that "the presence of COVID-19 on Plaintiff's property did not cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos or remove poisonous fumes which permeate property. Instead, all that is required for Plaintiff to return to full working order is for the [government orders and restrictions to be lifted].") (quoting *First & Stewart Hotel Owner, LLC v. Fireman's Fund Ins. Co.*, No. 21-cv-00344, 2021 WL 3109724, at *4 (W.D. Wash. July 22, 2021)).[4]

While *Inns* did not foreclose the possibility that some other "invisible airborne agent" might "cause a policyholder to suspend operations," 71 Cal. App. 5th at 704-05, the court *specifically* considered the effect (or lack thereof) of COVID-19 on property, finding that even COVID-19's alleged and assumed presence at the insured's property *did not present a situation where the virus was causing physical loss or damage to property*. *Id.* at 705. JRK likewise fails to identify any specific direct physical loss or damage to its properties, i.e., physical alteration or permanent dispossession, caused by COVID-19's presence.

JRK's pleading deficiencies go deeper, however, for its own allegations betray its contentions that the virus "compromises the physical integrity of the structures it permeates" and that it rendered JRK's properties "unusable for their intended purpose." For example, JRK alleges

[4] The *Inns* court noted that the claim at issue did "not involve a scenario in which a business has alleged it was the target of an order requiring its particular premises to close for a period of time due to the demonstrated presence of a person infected with the COVID-19 virus. For example, such an order hypothetically might be issued to allow a particular business to undertake disinfection procedures or to allow time for the virus to dissipate. Inns has not suggested that it could amend its complaint to add any such allegations." *Inns*, 71 Cal. App. 5th at 699 n.12. But the court did "not decide whether commercial property insurance coverage might be triggered in such a circumstance." *Id.* In any event, JRK makes no such allegations here.

that the government orders required tenants to stay at home unless they were engaging in certain limited activities, "such as getting groceries or medicine, or to perform essential jobs," that "its apartment properties face increased exposure when tenants are ordered to 'stay home,'" and that "the public areas such as lobbies and elevators [were] required to be open for safety and building use." Compl. ¶¶ 5, 73. In so doing, JRK acknowledges that, despite their "increased exposure" to the virus, its residential properties remained open and were used for their intended purpose while the government orders were in effect because JRK's tenants were required to stay at home.

Similarly, JRK alleges that "three of [its] properties primarily house senior citizens at particularly high risk of infection, necessitating even greater vigilance by JRK in order to ensure their safety. In an effort to ensure residents' safety, JRK recently sponsored and coordinated a vaccine drive for senior citizen residents at its La Mirada, California property." Compl. ¶ 74. None of this establishes physical loss or damage to the properties, which continued to be used for their intended purpose—housing senior citizens. The *Inns* court observed that "despite [plaintiff's] allegation that the COVID-19 virus was present on its premises, it has not identified any direct physical damage to property that caused it to suspend its operations." 71 Cal. App. 5th at 705. That observation applies squarely to JRK's Complaint.

JRK also does not allege that the financial losses for which it seeks coverage resulted from any direct physical loss or damage caused by the presence of the COVID-19 virus on its properties. Nor can it. *Inns*, 71 Cal. App. 5th at 703 ("[Plaintiff] cannot reasonably allege that the presence of the COVID-19 virus on its premises is what *caused* the premises to be uninhabitable or unsuitable for their intended purpose."). And without such a causal connection, JRK's coverage claims fail as a matter of law. *Id.*

C. JRK misapprehends the Court of Appeal's holdings in *Inns*.

In an apparent effort to resist the controlling authority of *Inns*, JRK cites a minority of pre-*Inns* California cases that denied motions to dismiss pandemic-related claims for coverage. Opp. at 13. Those cases have no application to this matter now that the Court of Appeal has spoken. Even less helpful to JRK is its citation to the minority of out-of-state cases that have denied similar

motions. *Id.* at 13-14 n.12. JRK does not try to reconcile the holdings in any of those cases with the Court of Appeal's analysis in *Inns*. It cannot be done.

JRK also disputes the requirement that it must show "a distinct, demonstrable, physical alteration of the property" to meet its burden of establishing direct physical loss or damage to property. Opp. at 15 (arguing that "no such requirement exists for JRK to state a valid claim for physical loss or damage under California law."). JRK is mistaken. *Inns* makes that clear:

> [I]n the context of first party property insurance[,] . . . mere loss of use of physical property to generate business income, without any other physical impact on the property, does not give rise to coverage for direct physical loss: "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers *a detrimental economic impact* unaccompanied by a *distinct, demonstrable, physical alteration of the property.*"

71 Cal. App. 5th at 705–06 (citations omitted) (last emphasis added).

Implicitly conceding that it has not met its burden of showing "a distinct, demonstrable, physical alteration of the property," JRK argues that "setting [that requirement] aside, it is a matter of common sense that the coronavirus is a physical substance that pervades property, attaches to surfaces, tangibly alters the air and renders indoor spaces dangerous." Opp. at 15. This "common sense" observation has been rejected by courts across California and across the country. *E.g.*, *JC/SC LLC v. Travelers Indem. Co. of Conn.*, No. 21-CV-04835, 2022 WL 263157, at *5 (C.D. Cal. Jan. 26, 2022) ("[T]o the extent Plaintiff asserts that the presence of COVID-19 on surfaces of or at the insured properties constitutes direct physical loss of or damage to the properties, numerous district courts within this circuit have also rejected this argument.") (collecting cases); *Barbizon Sch. of S.F., Inc. v. Sentinel Ins. Co.*, No. 20-CV-08578, 2021 WL 1222161, at *9 (N.D. Cal. Mar. 31, 2021) (collecting cases rejecting the theory that the virus constitutes direct physical loss or damage to property because COVID-19 can remain on surfaces); *Protégé Rest. Partners LLC v. Sentinel Ins. Co.*, 517 F. Supp. 3d 981, 988 (N.D. Cal. 2021) ("Even if Plaintiff had known of a specific instance of COVID-19 particles inside of its business, evidence of such would still not qualify as a 'physical change' to the property."); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 517 F. Supp. 3d 1096, 1106 (S.D. Cal. 2021) (finding that the virus does not cause "physical

damage to property because the virus harms human beings, not property"); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, 512 F. Supp. 3d 1019, 1024 (N.D. Cal. 2021) (same).[5]

JRK's appeal to "common sense" does not satisfy its burden, as the plaintiff, to allege facts sufficient to state a claim—a burden it has failed to meet here. Indeed, "common sense" shows that COVID-19 never caused any physical loss or damage to JRK's residential and hotel properties.

D. JRK fails to allege facts showing that access to any of its properties, or ingress to or egress from any of its properties, was impaired.

JRK does not respond to Insurers' argument that, beyond the threshold requirement of alleging direct physical loss or damage, JRK also fails to allege the additional requirements for coverage under the Civil or Military Authority and Ingress/Egress provisions. In particular, JRK must also allege that access to its properties was "impaired by any order of civil or military authority" (for Civil or Military Authority coverage), or that ingress to or egress from any of its properties was impaired by direct physical loss or damage to property (for Ingress/Egress

[5] Nine federal courts of appeal have concluded there is no coverage in similar cases. *See, e.g.*, *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 21-1311, 2022 WL 66298, *6 (4th Cir. Mar. 7, 2022) ("[N]either the closure order nor the Covid-19 virus caused present or impending material destruction or material harm that physically altered the covered property requiring repairs or replacement so that they could be used as intended. Thus, we hold that the policy's coverage for business income loss and other expenses does not apply to [plaintiff's] claim for financial losses in the absence of any material destruction or material harm to its covered premises. We observe that our holding is consistent with the unanimous decisions by our sister circuits, which have applied various states' laws to similar insurance claims and policy provisions.") (collecting cases) (footnotes omitted); *Santo's Italian Café*, 15 F.4th at 401-402 (noting that the property "has not been tangibly destroyed, whether in part or in full" by the coronavirus, which "did not physically affect the property in the way, say, fire or water damage would"); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021) ("Even if the virus was present and physically attached itself to [the insured's] premises, [the insured] does not allege that the virus altered the physical structures to which it attached, and there is no reason to think that it could have done so."); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021) ("[W]e do not see how the presence of those particles would cause physical damage or loss to the property."); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-CV, 2022 WL 258569 (2d Cir. Jan. 28, 2022) ("[W]e agree with the district court that the virus's inability to physically alter or persistently contaminate property differentiates it from radiation, chemical dust, gas, asbestos, and other contaminants whose presence could trigger coverage under [plaintiff's] policy."); *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 460 (5th Cir. 2022) ("Even if [plaintiff] alleges COVID-19 was present in its restaurants, the civil authority orders did not result from [plaintiff's exposure to the virus."); *Oral Surgeons*, 2 F.4th at 1144 (same); *Mudpie*, 15 F.4th at 892 (same); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 710-711 (10th Cir. 2021) (same); *Ascent Hospitality Mgmt., LLC v. Emps. Ins. Co. of Wausau*, No. 21-11924, 2022 WL 130722, at *3 (11th Cir. Jan. 14, 2022) (same).

coverage). *See* Opening Br. at 13-14. If anything, JRK's allegations show the opposite—that the government orders forced JRK's tenants to "stay at home except for essential purposes." Compl. ¶ 62; *see also id.* ¶ 5 ("The Orders . . . permitted residents to leave their homes only for limited purposes such as getting groceries or medicine, or to perform essential jobs."). JRK also alleges that "countless employees, tenants, and visitors enter[ed] and inhabit[ed] the nearly 100 properties JRK owned at the start of the pandemic." *Id.* ¶ 73. Without an impairment of access, there can be no coverage under the Civil or Military Authority or Ingress/Egress coverage provisions.

JRK's argument that the specific orders at issue in this case were issued out of a concern for property damage, Opp. at 17, is also unavailing. Commenting on the same mayoral order on which JRK relies, the Central District of California recently observed:

> [T]he curiously specific reference to "physically causing property loss or damage" is in the context of an order overwhelmingly concerned with the spread of COVID-19, not any property damage. There can be no reasonable dispute that the Mayor would have issued the closure order regardless of his purported belief that "physical . . . property loss or damage" was occurring in the city.

Create Advert. Grp., LLC v. Fed. Ins. Co., No. 21-cv-5975, 2022 WL 831479, at *1 (C.D. Cal. Mar. 17, 2022). The same reasoning applies here.

E. JRK concedes it does not meet the requirements for coverage under the Interruption by Communicable Disease provision.

JRK also fails to establish that it is entitled to coverage under the limited Interruption by Communicable Disease provision. Although the provision does not require direct physical loss or damage, it provides coverage only if "access to a Location . . . is limited, restricted, or prohibited *as a result of*" an order or decision responding to *the actual presence* of a communicable disease. Jt. Stip., Ex. 1, at GENERALSTAR00000062 (emphasis added).[6] JRK has not alleged any facts suggesting that this coverage has been satisfied. It does not identify any "order of an authorized governmental agency regulating the actual presence of communicable disease" or any "decision of

[6] As Insurers noted in their opening brief, the Policies' Communicable Disease provision is subject to a program sublimit of $2.5 million. Opening Br. at 14 n.10 (citing Jt. Stip., Ex. 1, at GENERALSTAR00000054). The program sublimit for the Communicable Disease provision precludes any possibility of recovery against the Excess Insurers under that provision. The Ironshore Policy contains an endorsement removing the Communicable Disease coverage provision. *See* Jt. Stip., Ex. 4, at IRONSHORE_000058, Endorsement No. 10.

an Officer of [JRK's] as a result of the actual presence" of the COVID-19 virus on or at JRK's covered locations that "limited, restricted or prohibited" access to any such location in response to the presence of COVID-19 there. *Id.* Nor can it. *See Inns*, 71 Cal. App. 5th at 699 (observing that "as the Orders establish, it was the presence of the virus *throughout* San Mateo and Monterey Counties—not the presence of the virus *specifically* on Inns' premises—that gave rise to the Orders, leading to Inns' suspension of operations.") (emphasis in original). Here, too, it was the presence of the virus throughout the counties in which JRK had properties that gave rise to the stay-at-home orders, not its presence specifically on any of JRK's premises.

JRK conceded as much in the amended complaint it filed in the Eastern District of Virginia when it stated: "The limited or prohibited access to JRK properties was a result of the global pandemic and government responses to it, ***not*** *due to an order by a governmental agency or JRK officer arising from the actual not suspected presence of the virus*." Churan Decl., Jan. 21, 2022, Ex. 1 ¶ 81 (emphasis added). JRK made the same allegation in its original complaint in that action. Churan Decl., Mar. 23, 2022, Ex. 1 ¶ 81. JRK thus twice stated categorically that the alleged limitations on or prohibitions of access to JRK's properties were "*not* due to an order by a governmental agency or JRK officer arising from the actual not suspected presence of the virus." *Id.* JRK's refutation of the Communicable Disease requirements was clear.

Nevertheless, JRK now tries to distance itself from its admission by arguing that it was not included in the operative complaint in this case. Opp. at 22 n.17. JRK cannot now allege inconsistent facts to try to save its action. The Court of Appeal has made this clear:

> A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. Likewise, the plaintiff may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false.

Cantu v. Resolution Trust Corp., 4 Cal. App. 4th 857, 877 (1992) (internal citation omitted). JRK cannot brush away the legal effect of its prior admissions, for "allegations contained in the plaintiff's complaint" "constitute judicial admissions. As such they are conclusive concessions of

the truth of a matter and have the effect of removing it from the issues." *Castillo v. Barrera*, 146 Cal. App. 4th 1317, 1324 (2007).

Even without its admission, JRK fails to show entitlement to coverage under the Interruption by Communicable Disease provision because it alleges no *facts* showing that any orders limiting access to its properties were issued due to the actual presence of COVID-19 at specific covered locations, as the provision requires.

F. To the extent JRK alleges its financial losses were caused by the COVID-19 virus, those losses fall squarely within the Policies' pollutants-or-contaminants and pathogens exclusions.

JRK criticizes Insurers for not citing "a single California state or federal decision barring coverage based on [the pollutants-or-contaminants] exclusion for COVID-19 related losses." Opp. at 23 (emphasis omitted). As a threshold matter, given that JRK has not met its burden of alleging facts sufficient to establish coverage, there is no need for the Court to reach the Policies' exclusions. The vast majority of courts in California and across the country have found no need to analyze applicable exclusions to coverage because the presence of COVID-19 does not result in covered loss in the first instance. In any event, California courts have yet to interpret the specific pollutants-or-contaminants exclusion at issue here in the context of pandemic-related coverage claims.[7] But courts in other states have.

The District of Nevada, for example, recently interpreted a similar exclusion with an identical definition of "pollutants or contaminants"—which expressly includes "virus"—and held that it precluded coverage for the plaintiff's pandemic-related financial losses. *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1278 (D. Nev. 2021); *accord Zwillo V, Corp. v. Lexington Ins. Co*., 504 F. Supp. 3d 1034, 1041-42 (W.D. Mo. 2020), *appeal dismissed*, No. 21-1015, 2021 WL 2792962 (8th Cir. Mar. 18, 2021) (pollution and contamination exclusion unambiguously barred coverage for plaintiff's claims for COVID-related business interruption).

[7] In *AECOM v. Zurich American Insurance Co.*, the court, applying California law, held that a contamination exclusion, which was defined to include "virus," "unambiguously applies to Plaintiff's claims. COVID-19 is a virus. Any alleged loss caused by the actual or suspected presence of COVID-19 in Plaintiff's properties is due to the virus, and is, therefore, barred by the plain language of the Exclusion." No. 21-cv-00237, 2021 WL 6425546, at *8 (C.D. Cal., Dec. 1, 2021).

The *Circus Circus* court found that "the SARS-CoV-2 virus and resulting COVID-19 pandemic falls squarely within the policy's pollutants-or-contaminants exclusion." 525 F. Supp. 3d at 1278. It then explained that plaintiff "cannot reasonably claim that SARS-CoV-2 is not a virus," and that plaintiff's "own pleadings support a finding that the virus has been released, dispersed, and discharged into the atmosphere, resulting in infections and transmissions." *Id.* The court also rejected the argument JRK makes here that the pollutants-or-contaminants exclusion, which encompasses health-harming viruses, was limited to the context of traditional or environmental pollution. *Id.*; Opp. at 22-23.

Likewise, the Southern District of New York held that a similar exclusion precludes coverage for plaintiff's pandemic-related financial losses. *Northwell Health, Inc. v. Lexington Ins. Co.*, No. 21-cv-1004, 2021 WL 3139991 (S.D.N.Y. July 26, 2021). It also rejected the same argument JRK makes that the pollutants-or-contaminants exclusion should be interpreted to apply only to traditional or environmental pollution, explaining:

> [T]he Policies contain endorsements that define contaminants to include viruses. Grouping viruses with environmental and industrial pollutants may be unorthodox, but *[plaintiff] cites no controlling cases construing 'contamination' not to include one of the terms in its contractual definition*. A court may not interpret an insurance contract in a way that leaves part of the contract meaningless. The Court declines to rewrite the unambiguous provision at issue here.

2021 WL 3139991, at *9 (internal citation omitted) (emphasis added). In so doing, the court distinguished *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15 (N.Y. 2003)—a case on which JRK relies, Opp. at 23—on the grounds that, unlike here, the policy at issue in that case did not define "contaminants" to include viruses. The other cases JRK cites to argue that the Policies' pollutants-or-contaminants exclusion is limited to traditional or environmental pollution, *see* Opp. at 22-23, are distinguishable on the same grounds—there is no reference to "virus" in the exclusions at issue. *See MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003) (pollution exclusion in comprehensive general liability policy did not reference viruses); *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 618 (Nev. 2014) (same).

The pathogens exclusions in the Evanston and RSUI policies preclude coverage for JRK's pandemic related financial losses for the same reason: JRK cannot reasonably deny that COVID-

19—which it alleges "is not only highly contagious but deadly," Compl. ¶ 48—is a pathogen within the meaning or express terms of those exclusions. Moreover, JRK has *no* argument that such pathogens exclusions are somehow limited to any narrow definition of pollutants or contaminants.

G. JRK's request to amend its Complaint should be denied; its alternative request to hold a decision granting Insurers' motion in abeyance is moot.

In a one-line request at the end of its Opposition, JRK asks the Court for leave to amend its Complaint "[t]o the extent [the] Court concludes that JRK has failed to adequately allege an entitlement to coverage." Opp. at 24. However, "[t]he plaintiff has the burden of proving that an amendment would cure the defect." *Inns*, 71 Cal. App. 5th at 713 (internal quotation marks and citation omitted). Without a showing that a reasonable possibility exists that the defect in the pleadings can be cured by truthful amendment, leave to amend should be denied. *See Taxpayers for Improving Pub. Safety v. Schwarzenegger*, 172 Cal. App. 4th 749, 781 (2009). JRK has not met its burden. The complaint at issue is JRK's *third* complaint asserting the same claims for pandemic-related coverage, and involves temporary government-ordered suspensions that occurred two years ago. JRK has had ample time and opportunity to allege additional facts that (it believes) could bring its claims within the terms of the Policy, but, in the several iterations of its claims to date, JRK never made any factual allegations that would support coverage. Any further amendment would be futile.

Alternatively, JRK requests that the Court hold in abeyance a decision granting Insurers' motion pending the appeal in *Inns*. Opp. at 25. But, the California Supreme Court recently denied review of *Inns*, which controls. JRK's request is now moot.

III. CONCLUSION

For the reasons presented above and in their opening brief, the Moving Insurers respectfully request the Court grant their motion for judgment on the pleadings and dismiss JRK's Complaint in its entirety with prejudice.

DATED: March 23, 2022

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, Suite 3400, Los Angeles, California 90067-3208.

On March 23, 2022, I served the foregoing document **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** on the interested parties in this action as follows:

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[X] **(BY ELECTRONIC SERVICE):** I caused each document to be sent by electronic transmission through One Legal through the user interface at www.onelegal.com to all email addresses on the list maintained by One Legal.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 23, 2022 at Los Angeles, California.

Jwana Harrold

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